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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re VICTORIA A., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

R.M.,

Defendant and Appellant.

D071786

(Super. Ct. No. J519043)

APPEAL from orders of the Superior Court of San Diego County, Sharon L.

Kalemkiarian, Judge. Affirmed.

Rosemary Bishop, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Patrice Plattner-Grainger, Deputy County Counsel, for Plaintiff and Respondent.

R.M. appeals orders denying her petition for modification under Welfare and Institutions Code section 388¹ and terminating parental rights under section 366.26. She contends the court erred when it denied her petition to return her daughter to her care. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

R.M. and V.G.² are the parents of Victoria A., who was born in May 2014. In August 2014, the San Diego County Health and Human Services Agency (Agency) detained Victoria (and her half-siblings) after multiple episodes of domestic violence between R.M. and V.G.³ The court adjudicated Victoria a dependent of the juvenile court and ordered a plan of family reunification services. Victoria's half-siblings were placed with their father.

R.M. diligently participated in reunification services. She began having unsupervised visits with Victoria during the first six-month review period. V.G. participated in services in Tijuana, B.C., Mexico, and had monthly visits with Victoria through the Mexican Consulate. In April 2015, the court returned Victoria to R.M.'s care under a plan of family maintenance services.

¹ All further statutory references are to the Welfare and Institutions Code.

² V.G. does not appeal. We refer to him only where relevant to the issues raised in this appeal.

³ The early history of the case is detailed in our unpublished case, *In re Madeline C.* (Apr. 10, 2015, D066800), and we need not repeat those details here.

In August 2015, R.M. was arrested for drug possession and transportation of drugs in connection to a drug sale to an undercover police officer. Victoria was in the car when R.M. was arrested. Victoria was crying and appeared to be hungry. Her diaper was soiled. Police officers found cocaine in the ash tray of R.M.'s car. The social worker learned that V.G. was in jail in San Diego County for illegally entering the United States, and R.M. and Victoria had visited him twice a week since his arrest. R.M. said she loved V.G. and wanted to be with him.

On August 31, 2015, the Agency placed Victoria with the same foster parents who had cared for her from August 14, 2014, the date she was initially detained in protective custody, to April 29, 2015, when she was returned to R.M.'s care. At the dispositional hearing on the removal petition, the court extended R.M.'s family reunification services to the 18-month review date, and terminated V.G.'s reunification services. R.M. and V.G. were incarcerated at the time of the 18-month review hearing in March 2016. The court terminated R.M.'s reunification services and set a section 366.26 hearing. The court continued the section 366.26 hearing several times for various reasons, particularly to allow the Agency to assess relatives for placement.

R.M. was released from Las Colinas jail in August 2016. She presented herself to U.S. Immigrations and Customs and was detained at a federal facility in San Diego County. R.M. was released from federal custody in October. She obtained a job and housing. On January 13, 2017, R.M. filed a section 388 petition for Victoria's return to her care, stating her circumstances had changed and it was in Victoria's best interests to be in her care.

On January 19, 2017, at the section 366.26 hearing, the court found that R.M. stated a prima facie case of changed circumstances and best interests, and ordered a hearing on her section 388 petition. The parties agreed the court could consider the evidence introduced at the hearing to determine both the merits of the section 388 petition and the findings required under section 366.26. The court admitted the Agency's reports and addendums in evidence.

The social worker testified Victoria was generally and specifically adoptable. She was an adorable two-and-a-half-year-old child. Victoria's caregiver wanted to adopt her, and the Agency supported the proposed caregiver adoption. R.M. and V.G. did not want Victoria to be adopted. However, they said the caregiver had provided very good care to Victoria and believed it was in her best interests to remain with her caregiver instead of being placed with relatives. The social worker said R.M. was working, seeing a therapist and taking parenting classes. R.M. had assistance with short-term housing. However, her housing situation was uncertain because she was facing deportation.

The social worker supervised 18 visits between R.M. and Victoria. R.M. was always excited to see her daughter. Although Victoria initially displayed some hesitation with R.M. when she first started visiting her at Las Colinas, Victoria would warm to her mother and they would play, cuddle, tickle each other, and read together. Victoria had a difficult time at a visit in October at the federal detention facility. When R.M. tried to pick her up, Victoria cried, pulled away and pointed to the social worker. R.M. sat on the floor and asked Victoria to sit with her, but Victoria refused until the social worker sat on the floor and encouraged her to play. Victoria crawled over to R.M. and buried her head

in R.M.'s lap. Victoria allowed R.M. to change her diaper but refused to allow her mother to fix her ponytail. During the rest of the visit, Victoria did not allow R.M. to pick her up. Victoria hugged and kissed R.M. when it was time to leave.

After R.M. was released from federal custody, visits usually took place at a McDonald's restaurant. On November 1, Victoria smiled but turned away as R.M. tried to hug her. Victoria stayed close to the social worker. Once food arrived, Victoria sat next to R.M. and fed French fries to her. After eating, Victoria played in the indoor play area. R.M. was attentive to her. Victoria hugged and kissed R.M. and said, "bye." During another visit, R.M. brought supplies for Victoria, including diapers with cartoon characters, which Victoria liked. Victoria fed French fries to R.M. They played together. R.M. was attentive to Victoria and caught her when she started to fall. When the social worker and Victoria arrived at the foster home, Victoria yelled "Mami" and ran to the caregiver.

The caregiver supervised a visit between R.M. and Victoria in late November. R.M. brought clothes and diapers for Victoria, and played with her. The caregiver tried not to intrude on the visit, but Victoria continuously came over to her and wanted her to participate in the activities with R.M. Victoria said, "[R.], no," when R.M. tried to hug or kiss her. The next three visits, which were supervised by the social worker, went well. At a visit on December 28, Victoria said, "yay!" when the social worker told her they were going to see R.M. at McDonalds. R.M. brought gifts to Victoria, who said (in Spanish), "mine," "thank you," and "Mama gave me," as she inspected each item. When the caregiver arrived, Victoria said "mami" and showed her all the gifts. R.M. hugged

and kissed Victoria good-bye. At a visit on January 12, 2017, the caregiver reported that Victoria refused to play with R.M. in the play area. Whenever R.M. approached Victoria, Victoria would say "no" and go to the caregiver.

R.M. testified she was working at a restaurant and volunteering at a community center. She had a hotel room but was looking for more permanent housing. While at Las Colinas jail, R.M. completed parenting classes, anger management, employment classes, and sewing and gardening classes. At visits, Victoria was always happy to see her. They read books and played. R.M. said she would like to engage in therapy with Victoria because being apart had affected their relationship. R.M. acknowledged she had made a mistake and had placed her daughter at risk. At the time of her arrest, she did not have money to pay rent. She believed if she lost her apartment she would lose custody of Victoria. R.M. said she would not make that kind of mistake again.

The court denied R.M.'s section 388 petition to return Victoria to her care. The court found that R.M. showed some change of circumstances but other circumstances had not changed. R.M. did not have stable housing. Victoria was not well cared for when she was removed from R.M.'s care for the second time, and the court was not confident R.M. would be able to exercise good judgment and properly care for Victoria. The court determined there were no exceptions to termination of parental rights. During visits, Victoria expressed a preference for her caregiver or the social worker to a greater degree than she did for R.M. The court terminated parental rights.

DISCUSSION

R.M. contends the juvenile court abused its discretion in denying her section 388 petition. She asserts she showed changed circumstances and the court's finding she lacked stable housing was not a sufficient reason to deny the petition. R.M. argues she also proved she had mitigated the problems that led to the dependency proceedings and it was in Victoria's best interests to live with her.

A

Relevant Legal Principles and Standard of Review

Under section 388, a parent, interested person or the dependent child (generically, petitioner) may petition the court to change, modify or set aside a previous order on the grounds of changed circumstances or new evidence. (§ 388, subd. (a).) The petitioner requesting the modification has the burden to show a change of circumstances or new evidence, and that the proposed modification is in the child's best interests. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; Cal. Rules of Court, rule 5.570(e).)

In evaluating whether the petitioner has met his or her burden to show changed circumstances and best interests of the child, the court considers a number of factors, including: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532, 531 (*Kimberly F.*)).

We review a denial of a hearing on a modification petition for abuse of discretion. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 808.) While the abuse of discretion standard gives the trial court substantial latitude, "[t]he scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.)

B

The Court Did Not Abuse Its Discretion In Denying the Section 388 Petition

By the time of the hearing, R.M. was no longer incarcerated, she was working, and she had continued to participate in services and have regular visits with Victoria. However, any modification under section 388 must consider the seriousness of the reasons for the continued removal of the child from the custody of the parent. (Cf. *Kimberly F.*, *supra*, 56 Cal.App.4th at p. 530.) Here, the reasons for the dependency proceedings include: repeated acts of domestic violence with V.G. as the perpetrator; R.M.'s failure to abide by a voluntary protection plan; V.G.'s assault on R.M. while she was holding Victoria in her arms; R.M.'s continuation of her relationship with V.G. while hiding it from the social worker; R.M.'s failure to follow visitation orders restricting V.G.'s visits with Victoria; R.M.'s decision to engage in transporting drugs to facilitate a sale, and to bring Victoria with her during the criminal act; Victoria's neglected condition when she was detained a second time; and R.M.'s subsequent incarceration and detention.

Under section 388, subdivision (a), the focus of a petition for modification is on whether, viewed in the context of the nature of the dependency proceedings, the petitioner has shown a meaningful change of circumstance. (Cf. *Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531.) R.M.'s decisions to continue her relationship with V.G. and to engage in a criminal enterprise placed Victoria at substantial risk of harm, and showed that R.M.'s participation in reunification services lacked any practical import. Viewed in this context, R.M.'s release from custody, employment, and continued participation in various services did not constitute a meaningful change of circumstance. (*Kimberly F.*, at p. 530.) The juvenile court reasonably concluded that R.M. had not successfully resolved her problems to the degree necessary to protect Victoria in her care, and thus did not meet her burden to show changed circumstances. (§ 388, subd. (a).)

In addition, the court reasonably determined it was not in Victoria's best interests to be returned to R.M.'s care. An important factor in determining the child's best interests is the strength of the existing bond between the parent and child. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531.) A correlative factor is the strength of the child's bond to her current caregivers and the length of time the child has been a dependent of the juvenile court. (*Ibid.*) At the time of the section 388 hearing, Victoria was four months shy of her third birthday. She lived with R.M. from birth until age three months, and then again from age 11 months to 15 months. Victoria lived with her caregiver for a total of 24 months, the last 17 months consecutively in her home. R.M. acknowledged her relationship with Victoria had been harmed by their separation, and wanted to engage in therapy with Victoria to restore it. Both R.M. and V.G. believed that Victoria's best

interests would be better served by allowing her to remain with her caregiver instead of placing her with relatives. The record shows that Victoria had a stronger bond to her caregiver than she did to R.M., and did not hesitate to express her preference. The court did not abuse its discretion in concluding it was not in Victoria's best interests to remove her from a safe, happy and secure home for an uncertain, and historically neglectful, placement with R.M.

DISPOSITION

The findings and orders are affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.